No. 05-1051

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IN THE

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

MOTOROLA, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ADECCO USA, INC.

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QUESTIONS PRESENTED

1. Whether this case presents an appropriate vehicle for resolving the conflict among the lower federal courts regarding the proper standard of "direct evidence" to be applied in employment discrimination cases?

2. Whether Petitioner's assertion that there is a conflict among the lower courts regarding the applicable standard for sexual harassment claims is illusory?

3. Whether the existing standard for sexual harassment claims obviates the adoption of a per se rule that sexual assault and touching constitute sexual harassment?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Adecco USA, Inc., is wholly owned by Adecco, Inc. and its ultimate parent is Adecco SA, a foreign corporation.

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INTRODUCTION

This case is not an appropriate vehicle to resolve the first issue advanced by Petitioner-namely, the existing split among the federal courts concerning the proper standard of "direct evidence" to be applied within the context of an employment discrimination case. The principal reason that this matter is not properly postured to resolve this conflict is that the evidence which Petitioner relies upon as direct evidence of retaliation is in fact inadmissible hearsay. Furthermore, Petitioner never raised or argued to the courts below that she had any direct evidence of constructive discharge or sexual harassment and, accordingly, she is precluded from making such an assertion at this time.

As to the second issue stated in the petition, there is in fact no conflict among the circuits or states concerning the standard to be applied to determine whether a hostile work environment exists. Furthermore, Petitioner's request that a per se rule be adopted whenever a "sexual assault" and/or "touchings" occur is unwarranted. Indeed, the current standard for analyzing hostile environment harassment is broad enough to encompass any allegations of "sexual assault" and/or touching of a sexual nature. A per se rule as contemplated by Petitioner is simply over inclusive and contrary to the existing doctrine which recognizes that any analysis must be flexible, contextual and fact specific.

It is clear that Petitioner's request for certiorari is largely founded on her dissatisfaction with how the lower court applied the law to the facts of her case. As Rule 10 of the Supreme Court Rules states, however, the proper role of a petition for certiorari is not for the purpose of correcting alleged error where no legal conflict exists among the circuits

and no important issue of federal law is otherwise at stake requiring action from this court to maintain decisional uniformity. Accordingly, the instant Petition for Writ of Certiorari should be denied in its entirety.

STATEMENT OF CASE

This is an employment discrimination case in which Petitioner alleged harassment by a coworker and retaliation by her employer in violation of Title VII of the Civil Rights Act of 1964, as amended, and in violation of the Florida Civil Rights Act. Petitioner also asserted a claim for constructive discharge. None of Petitioner's claims survived at the district court level. On appeal, the Eleventh Circuit Court of Appeals ("Eleventh Circuit") affirmed the United States District Court for the Southern District Florida's ("District Court") in its dismissal of Petitioner's claims on summary judgment.

A. District Court Proceedings

Respondent Adecco filed a Motion for Summary Judgment on May 1, 2003 and Motorola filed its Motion for Summary Judgment on May 5, 2003. The District Court heard oral argument on the Motions on August 22, 2003. After deliberating for seven months, the District Court granted the motions, dismissing Petitioner's claims for hostile environment harassment, retaliation, and constructive discharge in their entirety.

With respect to its decision to dismiss Petitioner's hostile environment claim, the District Court relied upon *Mendoza v. Borden Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999), setting

forth the following elements for a *prima facie* case[1] of hostile environment harassment:

> An employee must show:
>
> (1) that he or she belongs to a protected group;
>
> (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;
>
> (3) that the harassment must have been based on the sex of employee;
>
> (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and
>
> (5) a basis for holding the employer liable.

(Pet. for Cert. at p. 23a). Furthermore, the District Court noted that, in regard to the fourth prong of the *prima facie* case, the workplace was to be analyzed "as a whole," consistent with factors established by this Court's decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). (Pet. for Cert. at pp. 24a-25a).

Using this standard and applying it to the facts in a light most favorable to Petitioner,[2] the District Court found that

1. Petitioner never asserted to the District Court that she had direct evidence of sexual harassment and, as such, the District Court applied analysis appropriate for a circumstantial case of harassment.

2. The facts that the District Court relied upon can be found at pages 12a-18a of the Petition for Writ of Certiorari.

Petitioner failed to establish that the incidents of which she complained met the second and fourth prongs of her *prima facie* case. (Pet. for Cert. at pp. 25a-28a). For example, many of the alleged harasser's comments, such as mentioning strip clubs to male and female coworkers alike and calling Petitioner's boyfriend a "dog," were not based on Petitioner's sex as required by the second prong set forth by *Mendoza*. Likewise, the District Court concluded that the instances of touching and other conduct by the alleged harassers were not so "frequent, severe, or pervasive to constitute actionable sexual harassment. . . ." (Pet. for Cert. at p. 26a). Accordingly, the District Court dismissed Petitioner's sexual harassment claim and granted summary judgment in Respondents' favor.

With respect to Petitioner's retaliation claim, Petitioner argued in response to Respondents' motions for summary judgment that she had direct evidence of retaliation. Specifically, Petitioner alleged that she was told by Tom Karge, her Adecco first line supervisor, that Laila Pennington, her Motorola first line supervisor, had made it impossible for her to become a permanent Motorola employee and that Motorola would not hire her because she "complained too much." (R2-78-167-70, R2-79-268-70). Both Respondents argued that such evidence was hearsay and, therefore, not admissible, reliable or probative of Petitioner's retaliation claim. Ultimately, the District Court rejected Petitioner's direct evidence argument because it made a factual determination that Petitioner was never denied a permanent position:

> [T]here is no evidence that Bussell was denied a permanent position at Motorola. Evidence has been submitted which shows that Bussell was never eligible for and thus, was never denied a permanent position at Motorola. The fact that she

> may have wanted or even expected to receive a permanent position at some time in the future is irrelevant.

Thus, Petitioner's retaliation claim was dismissed by the District Court along with her other claims. (Pet. for Cert. at p. 31a).

B. Appellate Court Proceedings

On appeal to the Eleventh Circuit, Petitioner asserted, by brief and in oral argument, that the District Court's decision dismissing all of her claims was erroneous. Specifically, Petitioner argued that the District Court erred when it found that the record did not support a finding that the alleged harassment was sufficiently severe or pervasive to be actionable. Petitioner further argued that the District Court erred in failing to find direct evidence of retaliation and in dismissing her constructive discharge claim.[3]

A three-judge panel of the Eleventh Circuit reviewed the case *de novo*. Based on its factual findings[4] and relying on *Gupta v. Florida Board of Regents* , 212 F.3d 571 (11th Cir. 2000), the three-judge panel decided, *per curiam*, that Petitioner had failed to establish a *prima facie* case of hostile environment harassment. Key to its reasoning, the panel opined that many of the comments made by the alleged harasser in the workplace were made to men and women alike, and, therefore, were not based on Petitioner's sex. The

3. Again, Petitioner never alleged she had direct evidence of sexual harassment or constructive discharge.

4. The facts that the Eleventh Circuit found probative appear at pp. 2a-7a of the Petition for Writ of Certiorari.

panel further noted that 10-16 alleged instances of touching by a co-worker over the period of several months were not severe or pervasive enough to constitute actionable harassment. The panel also noted that many of the cases cited by Petitioner involved harassment by a supervisor, not by a coworker, and that Petitioner failed to provide "an analogous holding that such alleged behavior is sufficiently severe or pervasive to constitute a hostile workplace sexual harassment claim." (Pet. for Cert. at p. 9a).

Petitioner also argued to the panel that she had direct evidence to support her retaliation claim. The panel, however, affirmed that there was no error by the District Court in rejecting Petitioner's retaliation claim, stating "there is no record evidence to support Bussell suffered from an adverse action by either of the defendants." (Petition for Cert. at p. 9a). The panel did not elaborate further, and simply concurred and affirmed the District Court's analysis and decision regarding the retaliation claim. Finally, the Eleventh Circuit rejected Petitioner's request for rehearing *en banc*.

This Petition for Writ of Certiorari ensued.

ARGUMENT

I. This Case Does Not Present An Appropriate Vehicle For Resolving The First Question Presented By Petitioner

Petitioner is correct when she asserts that there is a split among the federal circuit courts of appeal and lower federal courts as to what constitutes "direct evidence" in the context of an employment discrimination case. Petitioner is also accurate in stating that there is a split within the Eleventh Circuit as to what definition of direct evidence to apply in employment discrimination cases. This case, however, is not

properly postured to resolve this conflict because Petitioner's so-called "direct evidence" of retaliation is inadmissible hearsay. Furthermore, Petitioner never asserted below that she had direct evidence of constructive discharge and sexual harassment and, therefore, cannot propound such argument at this time. Thus, as explained more fully below, this case cannot be a proper vehicle for resolving this legal issue.

A. The Evidence Petitioner Seeks To Proffer As Direct Evidence Of Retaliation Is Inadmissible Hearsay.

Petitioner alleges that she was told by Tom Karge, her Adecco first line supervisor, that Laila Pennington, her Motorola first line supervisor, had made it impossible for her to advance and that Respondent Motorola would not hire her permanently because of her complaints. (R2-78-167-70, R2-79-268-70). This constitutes the entire scope of Petitioner's "direct evidence" of retaliation. On it is face, this purported statement is double hearsay. *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455-57 (11th Cir. 1997) (comments by low-level supervisors repeating management's discriminatory comments are inadmissible hearsay), *accord Rojas v. Florida*, 285 F.3d 1339, 1343 n.3 (11th Cir. 2002). Furthermore, Karge, an Adecco employee, cannot make an admission on behalf of Respondent Motorola or vice versa. *See also Watson v. Adecco Employment Services, Inc.*, 252 F. Supp. 2d 1347, 1352-53 (M.D. Fla. 2003) (Adecco representative's purported statement to temporary workers that Adecco's client did not want them to return to work was inadmissible hearsay). Indeed, Petitioner admitted that no one at Motorola ever told her she would not become a permanent employee. (R2-78-167-70, R2-79-268-70). Therefore, the statement is inadmissible and was properly discounted by the lower courts in this case.

Even without regard to the inherent hearsay problems associated with the statement asserted above, Petitioner's retaliation claim would still fail on entirely independent grounds. First, there was no evidence in the record that any decision, one way or the other, was ever made regarding a permanent position for Petitioner with Motorola. (R2-79-267-69).[5] To the contrary, there was undisputed evidence in the record that Motorola was in the process of downsizing employees and was not hiring anyone. (R2-79-266; R2-82-62). The record further revealed that Petitioner was ineligible for permanent employment with Motorola as she had not yet been in her temporary assignment for a year. (R2-82-57-58).[6] Since Petitioner was *never* eligible for permanent employment at Motorola in the first instance, her retaliation claim that she was denied permanent employment simply does not bear scrutiny. *See, e.g., Williams v. Potter*, 316 F. Supp. 2d 1122, 1141 (D. Kan. 2004) (plaintiff who was ineligible for position because of low examination score could not prevail on retaliation claim alleging non-promotion). Consequently, the conflict regarding direct evidence in employment discrimination cases cannot be resolved based on the facts of this case.

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5. The record shows that Laila Pennington made no hiring decisions regarding Petitioner or anyone else. (R2-83-101).

6. When Petitioner left her assignment at Motorola at the end of January, 2001, she had been employed there for about eight months. She had only been there five months when she first complained of any harassment in October 2000.

B. Petitioner Never Asserted In The Courts Below That There Was Direct Evidence Of Constructive Discharge Or Sexual Harassment.

At page 15 of the Petition for Writ of Certiorari, Petitioner asserts that Adecco employee Kathy Brodeur stated that Petitioner "was forced out due to continuing harassment" and that Thomas Karge made a written notation that Petitioner "resigned due to continuing harassment" and that both statements constitute direct evidence of constructive discharge and harassment. In the first instance, Petitioner never argued to the courts below that she had direct evidence of these claims. Accordingly, she cannot now raise this argument for the first time in the context of a petition for writ of certiorari. *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (Supreme Court ordinarily does not consider issues "neither raised nor decided below"). Thus, these arguments are not properly before this Court and must be rejected. *Id.*

Not only are these arguments procedurally barred from this Court's consideration, but there was an independently sufficient ground for dismissing this claim as well. By her own admission, Petitioner states that at the time she resigned from her assignment at Motorola on January 31, 2001, the alleged harassment had been stopped for at least a month:

> Q. Okay. So [the alleged harasser] stopped touching you around late November, early December [2000]?
>
> A. Right.

(R2-79-304-306)

> Q. And let me just, so I'm clear, because I'm trying to get it clear in my head. Is it safe to say then after mid-December, [the alleged harasser] made no other comments to you about the size of your breasts or your hair growing because of sex, from mid-December through January 31st?
>
> * * *
>
> A. After December 26th, was the last time that I ever spoke to [the alleged harasser].

(R2-78- 165-66). Moreover, a week prior to her resignation on January 31, 2001, Motorola removed the alleged harasser from Petitioner's department, and placed him on a completely separate floor. (R3-153-7; R2-81-29; R2-78-119-20). Accordingly, Petitioner was not in fact subject to any hostile or unlawful conditions at the time she voluntarily left her Motorola assignment. (*Id.*)

Based on this undisputed record evidence, it was impossible for Petitioner to have sustained a constructive discharge claim with or without the alleged statements attributed Brodeur and Karge. Indeed, this Court has expressly held that to prevail on a claim of constructive discharge, the law requires that conditions be so unbearable that a reasonable person would feel compelled to resign. *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2351, 2354 (2004) (a plaintiff may only succeed on a constructive discharge claim if she demonstrates that "working conditions [were] so intolerable that a reasonable person in [her] position would have felt compelled to resign.") Petitioner's claim does not meet this standard. More specifically, since the harassment had stopped and the harasser had been removed

from Petitioner's department and work space, her work place was not so intolerable that it was reasonable for her to resign at that time.[7] *Id.*

Furthermore, while Petitioner may have ceased working at the Motorola facility, she was not in fact terminated or separated from her employment with Respondent Adecco. Indeed, upon Petitioner's departure from the Motorola facility, Adecco immediately found her another assignment with a different Adecco client. (R3-153-9; R2-78-170-71; R2-79-208-09; R2-82-119-20, 175, 227-28, 231-33). Thus, Petitioner remained in Adecco's employ and was not in fact "discharged," constructively or otherwise, from her employment with Adecco. (*Id.*)

In sum, since Petitioner, by her own admission, was not suffering from any form of harassment at the time of leaving her assignment and by virtue of the fact that she was still employed by Adecco, it was not possible for Petitioner to sustain a viable claim for constructive discharge. No finding of direct evidence by the lower courts would have changed this outcome. Thus, this case will not, as Petitioner erroneously asserts, resolve the current conflict among the federal courts regarding direct evidence to apply in the employment discrimination context. Therefore, the Petition for Writ of Certiorari should be denied as to this issue.

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7. Moreover, Petitioner's chief motivation for leaving Motorola was not that she was still experiencing harassment, but the fact that the alleged harasser had not been terminated as a result of her complaints. (R2-78-118-19). Her dissatisfaction with Motorola's business decisions simply cannot sustain a claim of constructive discharge.

II. There Is No Conflict Regarding The Standard Of Proof Necessary To Determine A Sexually Hostile Working Environment.

Petitioner's assertion that there is a split among the Circuits regarding the standard of analysis for a hostile working environment is illusory. In this case, relying on the Eleventh Circuit's *en banc* decision in *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999), the District Court adopted the following hostile environment standard:

> An employee must show:
>
> (1) that he or she belongs to a protected group;
>
> (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;
>
> (3) that the harassment must have been based on the sex of employee;
>
> (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and
>
> (5) a basis for holding the employer liable.

(Pet. for Cert. at p. 23a). Additionally, the District Court noted that, in regard to the fourth prong of the *prima facie* case, the workplace was to be analyzed "as a whole," consistent with factors established more than a decade ago by this Court's decision in *Harris v. Forklift Systems, Inc.*, 510 U.S.

17 (1993).[8] (Pet. for Cert. at pp. 24a-25a). On appeal, the Eleventh Circuit applied the same standard, citing *Gupta v. Florida Board of Regents* , 212 F.3d 571 (11th Cir. 2000), a

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8. This Court stated in *Harris*, 510 U.S. at 21-23, that:

> . . . When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," . . . , that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," . . . , Title VII is violated.
>
> This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in a employee," does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.
>
> * * *
>
> This is not, and by its nature cannot be, a mathematically precise test. . . . [W]e can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

(Citations omitted).

case which adopted and reaffirmed the analysis set forth in *Mendoza* and *Harris*.

Unlike Petitioner's claims to the contrary notwithstanding, all circuits follow *Harris*, as they must and the formulas they have adopted in order to do so are not materially different or in tension with each other — much less in actual conflict. *See Pomales v. Celulares Telefonica, Inc.*, __ F.3d __ (1st Cir. 2006) (applying severe and pervasive standard and citing to *Mendoza*); *Alfano v. Costello*, 294 F.3d 365, 373-74 (2nd Cir. 2002) (Holding that "[a] hostile work environment claim requires a showing [1] that the harassment was 'sufficiently severe or pervasive to alter the terms or conditions of the victim's employment and create an abusive working environment,' and [2] that a specific basis exists for imputing the objectionable conduct to the employer," and citing to *Harris*); *Weston v. Pennsylvania*, 251 F.3d 420, 425-26 (3d Cir. 2001) (applying five-pronged test as well as analysis articulated in *Harris*); *Connor v. Schrader-Bridgeport International, Inc.*, 227 F.3d 179, 192 (4th Cir. 2000) ("A sexual harassment claim due to a hostile or abusive work environment requires proof of: (1) unwelcome conduct; (2) that is based on the plaintiff's sex; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer"); *Harvill v. Westward Communications, LLC*, 433 F.3d 428, 434 (5th Cir. 2005)

> To establish a hostile work environment claim, [plaintiff] must demonstrate that: (1) she is member of a protected group; (2) she was the victim of uninvited sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of

> [plaintiff's] employment; and (5) her employer knew or should have known of the harassment and failed to take prompt remedial action.

Burnett v. Tyco Corporation, 203 F.3d 980, 982-83 (6th Cir. 2000) (articulating and applying standard set forth by this Court in *Harris v. Forklift Systems*); *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498 (7th Cir. 2004) (Applying *Harris* analysis and citing to *Mendoza*); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 616 (8th Cir. 2000)

> A plaintiff asserting a hostile work environment claim must show (1) membership in a protected class, (2) unwelcome sexual harassment, (3) based upon gender (4) resulting in an effect on a term, condition, or privilege of employment, and (5) that the employer knew or should have known about the harassment and failed to take proper remedial action. [citation omitted] . . . In addition, the plaintiff must show that the sexual harassment created an environment that was both objectively and subjectively abusive.

(*Citing Harris*, 510 U.S. at 21); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 871-72 n.4 (9th Cir. 2001) (using three-prong test, as well as severe and pervasive analysis set forth in *Harris*); *Riske v. King Soopers*, 366 F.3d 1085, 1091 (10th Cir. 2004 (articulating and applying standard set forth by this Court in *Harris v. Forklift Systems*).

In sum, there is in fact *no conflict* among the lower federal courts on this issue. *Id.* Nevertheless, in support of her request for certiorari, Petitioner contends that the lower courts "explained away the instances of sexual touchings

individually, rather than collectively," essentially accusing the Eleventh Circuit of failing to consider the "totality of the circumstances" in her case.[9] This argument proffered by Petitioner neither evinces a conflict among the circuits nor otherwise raises an important question of law requiring this Court's resolution, but instead merely raises an alleged point of analytical error. Such an error is not a proper subject for certiorari.

Indeed, Supreme Court Rule 10 states that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Instead, a "[a] petition for writ of certiorari will be granted only for compelling reasons" such as to resolve conflicting decisions among the federal appellate courts "on the same important matter." U.S. Sup. Ct. Rule 10(a). As shown by a review of the appellate cases above, Petitioner has wholly failed to show an existing conflict regarding hostile environment analysis. Nor has Petitioner shown that the courts in this case improperly stated the rule of law that applied to her case. As such, there are no grounds for granting the petition in regard to this second issue as asserted by Petitioner.

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9. Petitioner then cites to several cases apparently in support of her contention that the lower courts erred in finding no hostile environment existed. Most of the cases cited by Petitioner, however, are inapposite because they involve harassment by a supervisor, not harassment by a coworker which is the issue in this case. *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Circuit 2000) (harassment by supervisor); *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62 (2d Cir. 2001) (same); *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (same); *Moring v. Arkansas Dept. of Correction*, 243 F.3d 452 (8th Cir. 2001) (same); *Turnbull v. Topeka State Hospital*, 255 F.3d 1238 (10th Cir. 2001) (harassment of hospital staff by hospital patients).

III. This Case Does Not Present Any Basis For Adopting A Per Se Rule That "Sexual Assault" And/Or "Touchings" Constitutes Sexual Harassment.

Petitioner further urges the Court to adopt a per se rule that a sexual assault and/or "touchings" automatically constitute actionable sexual harassment. However, because there is no evidence in the record that Petitioner was sexually assaulted[10] she only has standing to advocate the overinclusive rule that any touching creates liability *per se*. Specifically, the record showed the following conduct:

- Robert Render, the alleged harasser, frequently complimented Petitioner. (R3-153-3; R2-73-49-52, 57, 61-62).

- Render talked loudly, used vulgar language, made demeaning comments about women's bodies in general, and bragged to various employees about his social life, which included cheating on his wife and

10. Section 784.011 of Florida's criminal statutes defines "assault" as "an intentional, unlawful threat by word or act **to do violence** to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such **violence is imminent**." (emphasis added). FLA. STAT. § 784.011 (2005). Moreover, Florida criminal law defines "sexual battery" as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." FLA. STAT. § 794.011(1)(h) (2005). By her own account of the conduct she was subject to, Petitioner never asserted that the alleged harasser threatened her with violence that she believed violence to be imminent. Nor were Petitioner's genitals penetrated by or united with the genitals of the alleged harasser.

visiting strip clubs. (R3-153-3; R2-78-49-51). Render's comments were addressed to technicians who sat near him or anyone else in the room, male or female, who would listen. (R3-153-3; R2-78-50-53).

- In October 2000, Render, who was behind Petitioner when she was bending over, pulled Petitioner's shirt up and the back waist of her pants down to expose a large tattoo across the lower half of her back. Petitioner was uncertain what Render said when he did this, but it was something along the lines of "nice tattoo" or "nice ink."[11] (R3-153-3-4; R2-78-63-64, 66-67, 78, 109).

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11. During cross-examination by counsel for Respondent Adecco, Petitioner's testimony on this issue was as follows:

> Q. Let's return to Render when he touched you. What did he do to you?
>
> A. I was bending over to pick up radios. I don't recall exactly what I was wearing, but it was probably something kind of baggy because I'm 30 pounds heavier than I am now.
>
> I was bending over picking up the radios when I felt someone pulling the back of my pants down and the top of my shirt up, and like pulling –I mean, like, not just pulling a little bit, like grabbing down and yanking my shirt up and saying something along the lines of nice tattoo, and I freaked out. I did not know what had just happened.

(R2-78-77-78).

(Cont'd)

(Cont'd)

Q. And when Bob pulls your slacks, whatever he pulled them, what comment did he make to you or anybody else about the tattoo?

[Petitioner's counsel]: Object to form.

Q. Did he say anything to you?

A. Yes, remember he said—okay.

When he pulled my pants down, he said nice tattoo or nice ink, one of the two. I believe it was tattoo.

Q. Nothing else?

A. No.

Q. Did he make any comment about your body, your buttocks or—

A. He didn't need to, he was touching it.

Q. I understand. But did he make any comment about your buttocks, about your body at the time he looked at the tattoo?

A. No.

Q. Didn't say anything about sex?

A. I told you, all he said was nice tattoo.

(R2-78-109).

Q. And when he touched you, he touched your clothes as opposed to—

(Cont'd)

- Render began a habit of "rubbing his crotch up against [Petitioner's] back as he walked by, as if there was not enough room for him to get through." (R3-153-4-5; R2-78-80-81). Petitioner further

(Cont'd)

> A. Well, he had to touch my body to get to my clothes. My clothes weren't just like loose off me. So, to rip down my pants, he's touching my lower back and my butt; and to rip up my shirt, he's touching my lower back and my butt; and to rip my shirt, he's touching my back.
>
> Q. But he didn't do any—well, let me ask you this: Did he do anything to either grope or attempt to massage your butt in any way?
>
> A. No.
>
> Q. At that time?
>
> A. No, all he did was pull down my pants and pull up my shirt.
>
> Q. Didn't make any comment about sex or desire to have sex with you at that time?
>
> [Petitioner's counsel]: Object to form.
>
> A. No.

(R2-78-110)

Note that at pages 5-7 of the Petition for Writ of Certiorari, Petitioner conveniently omits the non-sexual comments Render made and the lack of any groping that occurred during this incident. Conceivably, had Petitioner's tattoo been in a place less titillating than her lower back (i.e., on her arm or hand), this touching would not have suggested or implied any form of sexually inappropriate conduct.

testified ". . . I would be sitting down and he would walk by and I could feel his pants and the contents rubbing up against my shoulder. I would turn around and he would wink at me funny or smile at me funny, and I would get grossed out." (R3-153-5, n.3; R2-79-305-06). This "rubbing" occurred approximately 10-15 times during November-December [2000] until finally, Petitioner got "fed up" and jammed the back of her chair into Render. After that, Render did not touch Petitioner in any manner again. (R3-153-5; R2-78-80-81, 119; R2-79-304-06).

- During November and December 2000, Render complimented Petitioner's body multiple times a day, commenting on her thick lips or telling her how nice her blouse looked. A couple of times he commented on how fast her hair was growing and stated that she must be sexually active. Twice he asked her why she would choose to be with a boy (referring to her same aged boyfriend with whom she lived) when she could have a man just like him. (R3-153-5; R2-78-39-40, 81, 113-14, 164; R2-79-304-06).

- Sometime after October 2000 but before December 2000, Jason Wells came up from behind her, grabbed her *underneath* her chest, and started tickling her. According to Petitioner, Wells said, "I bet your daddy touched you like that when you were a little girl and you liked it." (R3-153-5-6; R2-79-284-85). Wells never touched Petitioner or said anything offensive to her again. (R3-153-6; R2-82-144).

- No other conduct occurred after December 26, 2000.

While the alleged harassers' conduct was boorish and inappropriate, it was not violent or criminal in nature.

In addition to omitting facts from context, Petitioner's rendition of the facts contains actual misstatements and/or exaggerations of the record evidence. For example, at pages i and 9, of the Petition for Writ of Certiorari, Petitioner states Jason Wells touched her breasts with his hands and that a penis was rubbed against her. Such assertions are unsupported by the record.[12] (R3-153-5-6; R2-79-284-85, 305-06, 311).

Moreover, the current state of analysis concerning hostile environment as articulated by *Harris v. Forklift Systems, Inc.* and its progeny, including *Mendoza* and *Gupta*, is broad enough to encompass cases where a true sexual assault has

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12. Similarly, Petitioner continues to cite and rely on inadmissible hearsay as "evidence" of harassment. Specifically, at page 9, Petitioner states Render would stand behind her and look down her shirt at her breasts; however, this statement is inadmissible hearsay as Petitioner says she was told this by her coworker:

> A. . . . Like I said, I didn't have any problems with [the alleged harasser] before. I would help him because he didn't have an air hose to blow out his lenses before he would send them off to get assembled and **then I was told that he was looking down my shirt** and I was like—
>
> Q. Told by whom?
>
> A. Jarvis said don't do that for him anymore, he's looking down your shirt and I'm like, yeah, right. But nothing had happened at that point.

(R2-79-305).

occurred, while evaluating "touchings" in context. In *Harris*, this Court has instructed as follows:

> This is not, and by its nature cannot be, a mathematically precise test. . . . [W]e can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Harris, 510 U.S. at 22-23. Under this broad standard of analysis, courts have been able to make findings of actionable hostile environment in cases where the facts involve egregious sexual misconduct, including sexual assault and rape. *See, e.g., Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 77 (1998) (threat of rape and physical assault by co-workers may create actionable hostile environment); *Little v. Windermere Relocation, Inc.* 301 F.3d 958, 967-68 (9th Cir. 2002) (Using *Harris* analysis to conclude that the rape of the plaintiff by a business colleague could support a finding of hostile environment); *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2nd Cir. 2004) (plaintiff's sexual assault by a coworker coupled with other conduct warranted finding of hostile environment). Thus, there is no need for this Court to adopt an overtly broad per se rule that sexual assault (not even present here) and/or that any arguably sexual touching constitutes a hostile work environment. Therefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

CONCLUSION

As demonstrated above, this case is not properly postured to resolve the existing conflict among the federal courts as to what standard of direct evidence to apply in the context of employment discrimination cases. Furthermore, Petitioner has otherwise failed to present any other conflict or compelling legal question warranting this Court's consideration. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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